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No. 80-161

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD FREEDLANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's indictment sufficiently charged the receipt of "kickbacks" in violation of 42 U.S.C. 1396h(b)(1).

2. Whether 42 U.S.C. 1396h(b)(1) is unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is reported at 625 F.2d 111. The opinion of the district court is reported at 468 F. Supp. 410.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1980. The petition for a writ of certiorari was filed on July 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Michigan to five counts of an information charging receipt of kickbacks in connection with furnishing services to individuals for which payments are made by Medicaid funds, in violation of 42 U.S.C. 1396h(b)(1).[1] Petitioner was sentenced to serve 45 days under a work-release program and to pay a fine of $10,000 on each count. Petitioner entered his guilty plea shortly after the trial court issued an opinion and order denying the defendants' motion to dismiss the indictment. *United States* v. *Weingarden*, 468 F. Supp. 410 (E.D. Mich. 1979). The court of appeals affirmed (Pet. App. 1a–20a).

The allegations of the information to which petitioner and his co-defendants pleaded guilty are quoted verbatim in the opinion of the court of appeals. The information charged that during August and September of 1976 petitioner "did knowingly and wilfully solicit and receive

[1] Petitioner's co-defendants, Richard Tapert, Harvey Golden, Gerald Weingarden, and Robert Gash, also pleaded guilty to receiving kickbacks (Pet. App. 4a). All five defendants were Detroit osteopathic physicians (*id.* at 1a).

kickback payments from Titan Laboratories, Inc., and M.A. Delaney, Inc. * * * principally to induce [him] to send his laboratory work to Titan Laboratories, Inc." and that the laboratory work was paid for in part with Medicaid funds (Pet. App. 8a).

ARGUMENT

1. Petitioner contends (Pet. 4–11) that the information is legally insufficient because the facts it alleges do not constitute a violation of the "kickback" provision of the pre-1977 version of the Medicaid statute, 42 U.S.C. 1396h(b)(1).[2] This claim is incorrect.

Petitioner relies principally on *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979), in support of his argument that the term "kickback" does not refer to a payment made to a party other than the party who initially transferred the sum to the payor, and that, since the scheme alleged in the information involved no payments from himself to the laboratory but only referrals of specimens, the payments by the laboratory to him were not illegal "kickbacks." The *Porter* decision held that "[i]n ordinary parlance, a kickback is the secret return to *an earlier possessor* of part of a sum received." 591 F.2d at 1054 (emphasis in original). While *Porter* supports petitioner and conflicts with the decision below and with that of the Seventh Circuit in *United States* v. *Hancock*, 604 F.2d 999, cert. denied, 444

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[2] Prior to its amendment in 1977, 42 U.S.C. 1396h(b)(1) provided:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any—
>
> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment * * *
>
> shall be guilty of a misdemeanor * * *.

U.S. 991 (1979), the conflict does not warrant review by this Court.[3]

First, the Fifth Circuit's narrow definition of "kickback" is plainly incorrect. As the district court's opinion demonstrates (468 F. Supp. at 412–414), the term "kickback," in both legal and lay usage, commonly refers to the receipt of money by a person (usually an agent) who has the ability to influence the disbursement of funds belonging to other persons or entities (often funds belonging to the agent's principal, but in this case Medicaid funds belonging to the federal government). Far from being an essential feature of the concept, prior ownership or possession of those funds by the recipient of the kickback is rare. Indeed, under the *Porter* definition of "kickback" it is difficult to imagine who could violate 42 U.S.C. 1396h(b)(1). Only

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[3]Petitioner asserts (Pet. 9–10) that the court of appeals' reliance upon *Hancock* was misplaced because the kickbacks in *Hancock* involved "corrupt payments," whereas here there were no allegations of "corrupt payments." But the conduct alleged here was in fact precisely the same as that alleged in the *Hancock* indictment—the receipt of kickbacks in return for referring Medicaid or Medicare patients' blood to a laboratory for diagnostic testing. In both cases, the payments were "corrupt" because they involved the "selling of what our society deems not to be legitimately for sale" (*United States* v. *Zacher*, 586 F.2d 912, 916 (2d Cir. 1978)), and a breach of the "duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner" (*ibid.*). It is worth noting in this connection that, since 1973, Michigan law has provided that "[a] person licensed to practice medicine * * * shall not receive a fee or other remuneration from a clinical laboratory or an intermediary for a clinical laboratory for submitting specimens from patients to a clinical laboratory." Mich. Stat. Ann. § 14.375(22) (1976). Violation of this section is a misdemeanor. Mich. Stat. Ann. § 28.199 (1962), § 28.772 (1972). Likewise, Section 21 of the Code of Ethics of the Michigan Association of Osteopathic Physicians and Surgeons provides that "[a] physician shall not pay or receive compensation for referral of patients." The legislative history of former 42 U.S.C. 1396h(b)(1) refers to "penalties for certain practices which have long been regarded by professional organizations as unethical, as well as unlawful in some jurisdictions* * *." S. Rep. No. 92–1230, 92d Cong., 2d Sess. 208 (1972).

government officials would have prior possession of the Medicaid funds; but since they are not providers of services, they could not violate the statute. It should not be assumed that Congress passed a statute defining a crime that no one can commit.

Second, the statutory language in question was amended in 1977 to leave no possible doubt that the kind of payments petitioner received are prohibited kickbacks. Thus, the conflict with *Porter* is of little continuing significance.[4] The 1977 clarifying amendment to 42 U.S.C. 1396h(b)(1) punishes "[w]hoever solicits or receives any *remuneration* (including any kickback, bribe, or rebate) * * *in return for referring an individual to a person for the furnishing * * * of any * * * service [reimbursable under Medicaid]" (emphasis added). 42 U.S.C. (Supp. II) 1396h(b)(1)(A).[5]

2. Petitioner also suggests (Pet. 4, 7) that the pre-1977 version of 42 U.S.C. 1396h(b)(1) is unconstitutionally vague. His whole argument on this point consists of a quotation from *Porter* (591 F.2d at 1054):

> If the meaning of the 1972 version of 42 U.S.C. § 1395nn(b) [the Medicare counterpart of 42 U.S.C. 1396h(b)(1)] was not clear and precise to the Congress and to the United States Attorneys charged with enforcing the law, then we are hard put to say, with that degree of confidence required in a criminal conviction, that these defendants were given clear warning by that statute that their conduct was prohibited by it, thus amounting to a criminal act.

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[4]This Court denied certiorari in *Hancock* in which the petitioners alleged the very same conflict. The issue is even less worthy of review now.

[5]The legislative history of the 1977 amendment makes it clear that Congress believed that it was merely clarifying, not altering, the original law enacted in 1972. See Pet. App. 16a–17a.

This argument is specious. Both courts below correctly rejected the "inference drawn in *Porter* that because 42 U.S.C. § 1395nn(b) was amended in 1977 due to a Congressional desire for further clarification, the statute was insufficiently clear before amendment so as not to give adequate due process warning that the conduct at issue was prohibited." 468 F. Supp. at 414–415. As this Court has observed, the "fact that Congress might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." *United States* v. *Powell*, 423 U.S. 87, 94 (1975), quoting *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). Because "the term kickback has a commonly understood meaning," the statute gave petitioner "fair notice that [his] conduct was forbidden." *United States* v. *Hancock*, *supra*, 604 F.2d at 1002. Compare *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162–163 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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